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IN THE SUPREME COURT
OF THE STATE OF UTAH

LENORE M. GILL,

Plaintiff-Appellant,

vs.

Case No. 19142

RULAND J. GILL,

Defendant-Respondent.

APPEAL FROM A JUDGMENT
AND ORDER OF THE THIRD DISTRICT COURT
SALT LAKE COUNTY, UTAH

HONORABLE J. DENNIS FREDERICK, JUDGE

APPELLANT'S
PETITION FOR REHEARING

Gary L. Paxton A2548
CLYDE & PRATT
77 West Second South #200
Salt Lake City, Utah 84101
Telephone: (801) 322-2516
Attorneys for Plaintiff-
Appellant

Dwight L. King
DWIGHT L. KING & ASSOCIATES, P.C.
2121 South State Street
Salt Lake City, Utah 84115
Telephone: (801) 486-8701
Attorneys for Defendant-Respondent

FILED

MAY 13 1986

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Dwight L. King
DWIGHT L. KING & ASSOCIATES, P.C.
2121 South State Street
Salt Lake City, Utah 84115
Telephone: (801) 486-8701
Attorneys for Defendant-Respondent

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PETITION

Appellant Lenore M. Gill hereby petitions the Supreme Court for a rehearing of her appeal upon the basis of the points and supporting arguments below.

DETERMINATIVE CONSTITUTIONAL PROVISIONS
AND STATUTE

On the date this appeal was argued and submitted to the Court, June 10, 1985, the Constitution of Utah, Article VIII, §2, provided in part:

The Supreme Court shall consist of five judges, If a justice of the Supreme Court shall be disqualified from sitting in a cause before said court, the remaining judges shall call a district judge to sit with them on the hearing of such cause.

Article VIII, §2, was amended effective July 1, 1985, to provide, in part:

The Supreme Court shall be the highest court and shall consist of at least five justices. ... If a justice of the Supreme Court is disqualified or otherwise unable to participate in a cause before the court, the chief justice, or in the event the chief justice is disqualified or unable to participate, the remaining justices, shall call an active judge from an appellate court or the district court to participate in the cause.

U.C.A. §78-2-3 (1953) provides:

The concurrence of three justices of the Supreme Court is necessary to pronounce a judgment; if three do not concur, the case must be reheard.

STATEMENT OF THE CASE

This is an appeal from the property-distribution and attorney's fee parts of a final judgment entered by the Third District Court, Salt Lake County, Utah, in a divorce action.

STATEMENT OF FACTS

The facts relevant to the petition presented are as follows: The appeal was argued to the five justices of this Court and submitted for their decision on June 10, 1985. Prior to that date no withdrawal or recusal of any justice had been entered in the Court's docket. During oral argument the parties were not made aware that any justice would not participate in the case. The Court's written decision affirming the judgment and order of the trial court was filed on April 29, 1986. Justice Durham did not participate in that decision. Appellant was given no notice that Justice Durham would disqualify herself and that her appeal would be decided by only four justices. Those justices who participated in the case were divided evenly between the Court's decision and the dissenting opinion.

SUMMARY OF ARGUMENTS

Because Mrs. Gill did not consent to her appeal being decided by four justices, the Court's failure to call another judge to participate upon Justice Durham's disqualification contravenes the mandatory language of the Constitution of Utah,

Article VIII, §2. That failure has materially effected the outcome of this appeal to Mrs. Gill's substantial prejudice since the remaining members divided evenly between the Court's affirming decision and the dissent. The vote of a fifth judge could have resulted in reversal. In addition, U.C.A. §78-2-3 (1953) requires that a case be reheard if three justices do not concur in pronouncing a judgment.

The Court's affirmance of the order below impliedly rejects a legal principle recognized under existing Utah case law as being applicable to contempt proceedings. The dissenting justices urge acknowledgment of that principle of law in ruling on this appeal. Resolution of this divergence of opinion on a point of law will be critical to the proper functioning of our trial courts.

Lastly, facts central to an equitable assessment of the trial judge's ruling have been misapprehended by the Court in reaching its decision.

POINTS OF PETITION
AND SUPPORTING ARGUMENT

I. THE COURT'S DECISION WAS
RENDERED CONTRARY TO
UTAH'S CONSTITUTION.

Utah's Constitution, Article VIII, §2 [hereinafter "\$2"], requires that if a member of the Supreme Court is disqualified or unable to participate in a cause another qualified judge

shall be called to sit and participate with the remaining justices in that cause. The term "disqualification" has been interpreted to include personal interest in the particular case on the part of a justice in addition to illness or disability. Critchlow v. Monson, 102 Utah 378, 131 P.2d 794, 800 (Utah 1942); In re Thompson's Estate, 72 Utah 18, 86, 269 P. 103 (1927) (disqualification may even include a member's death). Disqualification may be accomplished by withdrawal or recusal on a judge's own motion whether or not the basis of the disqualification is disclosed. Utah's Code of Judicial Conduct, Cannon 3, C. and D.

Notwithstanding the mandatory language of §2 concerning the calling of a substitute judge to sit in the absence of a justice, this Court has stated in dicta that a case may be submitted to the remaining members of the Court for decision if the parties consent. In re Thompson's Estate, supra, at 86. In that case a substitute district judge was called to sit but no challenge to his participation was made until after the decision was rendered. Because the case had been argued and submitted without objection to the district judge's participation the respondent was found to have consented to the composition of the court. Id. at 89.

The necessity for making such an objection in a timely manner was reemphasized in Shippers' Best Express, Inc. v. Newsom, 579 P.2d 1316 (Utah 1978). There it was argued on

rehearing that Retired Justice Henroid's participation in the case for Justice Hall had been improper. This Court held:

Pursuant to the statute [U.C.A. §49-7-5.7 (Supp. 1967)], Justice Henroid was invited to sit on this case. His vote in the matter was not needed as the decision was a per curiam opinion with two of the five justices concurring in the result. Not only was his vote immaterial, but the appellant is not in a position to complain about it for he did not object when the appeal was heard and decided by the Court as then constituted. He only complains about the membership of the Court after the decision was rendered partially against him.

579 P.2d at 1318.

At footnote 3 of the Shippers' Best decision the procedure employed in an earlier case before this Court in securing the parties' consent to the participation of a retired judge and a district court judge was recounted as follows:

The parties appeared for argument; the Chief Justice announced the disqualification of two Justices, named those selected to sit in their stead, and asked and obtained for the parties through their counsel, the approval of the court as so constituted.

579 P.2d at 1318.

Mrs. Gill's case was argued and submitted to this Court en banc. Justice Durham's withdrawal was not announced when the parties appeared for argument and no recusal had been entered in the clerk's docket prior to that time. The first notice Mrs. Gill had that Justice Durham would not participate in the case was when she received the Court's written decision.

Given these circumstances and under the facts of the In re Thompson's Estate and Shippers' Best cases it cannot be said that Mrs. Gill submitted her case to a panel of only four justices by consent. She was given no opportunity to object and, therefore, did not waive the constitutional right to have her case decided by a full Court. She would not have given such consent for two principal reasons: her appellant's burden of persuasion would have increased by the proportionate difference between three votes of five and three votes of four; and, she would have risked the very thing that has occurred, i.e., a 50/50 split among the participating justices resulting in affirmance of the order below.

A rehearing is appropriate when a member of a court dies after submission of the case and before a decision is rendered leaving the remaining justices divided. James v. Clements, 217 F.51 (5th Cir. 1914). C.f., In re Thompson's Estate, *supra*, (death may constitute "disqualification"). A rehearing was found to be necessary where a decision did not have the concurrence of the number of judges required by the state's constitution. See: Denver & R.G.R. Co. v. Burchard, 35 Colo. 539, 86 P.749, 755 (1906) where it was stated:

This case was argued and submitted prior to April, 1905. It was decided on May 1, 1905. April 5, 1905, the Old Supreme Court, consisting of three judges, ceased to exist, and on and from April 5, 1905, the constitutional Supreme Court consisted of seven judges, and was controlled by the

Constitution as amended. After April 5, 1905, no solid constitutional decision could be rendered by the court unless concurred in by at least three judges. The former opinion handed down herein was concurred in by but two judges, the decision was not in conformity with constitutional requirements, and, not being such, was a sufficient reason for ordering a rehearing before the full bench.

Although the Burchard court sitting en banc on rehearing sustained the former opinion, in doing so it rejected the argument that the railroad company's inclusion of the constitutional vote-concurrence point as an additional ground for rehearing was untimely, saying:

[T]he original opinion, being on its face in plain violation of the Constitution, was a nullity. The court was without power to hand down a decision concurred in by only two justices. The court would have ordered a rehearing on its own motion.

86 P. at 755.

Mrs. Gill does not cite Burchard to suggest the decision in her case is a nullity. However, she does contend that she has been denied the constitutional right to have her case decided by a five-member Court without her consent and that for this reason she can request the Court's decision be set aside. Accordingly, by this petition Mrs. Gill invokes the constitutional mandate of §2. Had that mandate been observed, the stalemate which has occurred on this appeal would have been prevented.

"To make an application for a rehearing is a matter of right, . . .," and when the court has overlooked some statute or

decision, or has misapplied or overlooked something which materially affects the result of an appeal, a rehearing is properly applied for. Cummings v. Nielsen, 42 Utah 157, 172-73, 129 P. 619 (1912). The mandate of §2 was overlooked in this case. That oversight has materially affected the result of this appeal in that the vote of a fifth judge may have produced a majority for reversal of the lower court's order.¹ It follows that Mrs. Gill has been substantially prejudiced in that she has been deprived of the opportunity to prevail.

II. A REHEARING IS REQUIRED
BY U.C.A. §78-2-3 (1953).

In the Shippers' Best decision on rehearing the dissent's citation of U.C.A. §78-2-3 (1953) as authority to be applied in resolving the petition for rehearing was rejected with this statement: "That section applied to the pronouncing of a judgment. In this case, the judgment has been pronounced." 579 P.2d at 1318. The judgment to which Justice Ellett was

¹ Appellant's research revealed no Utah decision by an evenly divided four-justice court. However, in those cases where a fifth sitting judge's participation has been challenged the decisions on rehearing have turned, in part, on whether his vote was material to the outcome. See: Shippers' Best, *supra*, (*per curiam* decision where retired justice's vote was immaterial) and People v. Tidwell, 5 Utah 88, 12 P. 638 (1886) (district judge's vote was sole dissent from majority; original opinion at 4 Utah 506.)

referring was the main opinion's affirmance of the lower court's judgment and verdict.

In the present case the Court has also affirmed the lower court's judgment and order. In so doing it has pronounced a "judgment." Because this judgment was not based upon the concurrence of three justices a rehearing of Mrs. Gill's appeal is required by the express language of U.C.A. 78-2-3 (1953), to wit:

The concurrence of three justices of the Supreme Court is necessary to pronounce a judgment; if three do not concur the case must be reheard.

This statute, formerly Comp. Laws Utah 1917, §1644, was cited in In re Thompson's Estate in connection with the constitutional provision of §2 that a majority of the Supreme Court's justices shall constitute a quorum to hold court and render a decision. Id. at 85. Although the 1985 amendment of §2 deleted this majority requirement except when laws are declared unconstitutional, U.C.A. §78-2-3 (1953) was not repealed or changed. Accordingly, by statute this Court's judgment affirming the order below is required to be set aside and Mrs. Gill's appeal reheard.

III. RESOLUTION OF THE COURT'S DIVERGENCE
ON THE LEGAL ISSUE PRESENTED BY REHEARING
WILL AVOID INCONSISTENT RULINGS IN OUR
TRIAL COURTS.

By affirming the trial court which denied relief to Mrs. Gill because it found her husband did not intentionally violate its restraining order this Court has impliedly rejected the principle of law recognized in Gunnison Irrigation Co. v. Peterson, 74 Utah 460, 280 P. 715 (1929), namely: that intent to violate a restraining order is irrelevant in a civil contempt proceeding in which damages are sought to indemnify a party for resulting loss. At the least, the Court's decision has cast doubt upon the continuing validity of this legal rule in cases of the kind involved in this appeal.

Restraining orders and injunctions are entered in cases where disadvantaged parties must be protected or the status quo must be maintained pending a plenary hearing. These are often proceedings in equity such as partnership dissolutions, receiverships, trustee-cestui disputes and, most significantly due to their number, domestic relations matters. When no imprisonment or fine is sought to be imposed for violation of such an order, the consideration of a no-intent plea serves to frustrate the equitable purposes envisioned by the order and contributes to cavalier attitudes of obedience to court orders and, ultimately, to disrespect for the judicial system. In domestic relations cases the ability of our district courts to effectively enforce orders of the broad variety they must make

would be impeded if in show cause and contempt proceedings it was always necessary to determine whether a party "intended" to do, or not to do, something given the existence of a valid court order compelling or restraining the party's doing of that very thing.

In this case the Court's decision and the dissent's opinion could not be more diametrically opposed on this legal issue. Chief Justice Hall impliedly holds that Mr. Gill's intent to violate the restraining order was relevant by this statement: "[A] canvas of the record fails to disclose any evidence that clearly preponderates contrary to the findings of the trial court that defendant did not hide or secret marital assets in violation of the court's order or the rights of plaintiff." Neither does the Court find the trial judge misapplied any principle of law. Whereas, Justice Zimmerman's dissent states: "The Utah courts have long recognized that civil contempt for violation of a court order or injunction requires no intent," and "the trial court acted contrary to the uncontradicted evidence when it refused to find the injunction had been violated and to compensate Mrs. Gill accordingly."

This divergence of opinion--in which the Court's other participating members concur--will undoubtedly effect the conduct of show-cause and contempt proceedings in our trial courts leading to inconsistent results. Under our system of government this Court is charged with the duty of clarifying and

pronouncing the law for the instruction of Utah's citizens and courts. A rehearing before a full Court will satisfy that charge by resolving the confusion created by this divergence.

IV. THE COURT'S RULING IS BASED UPON
A MISAPPREHENSION OF THE FACTS.

Appellant suggests that the Court's assessment of the equities in this case, as reflected by the facts recited in its decision, was derived from a misapprehension of the true facts concerning Defendant's operation of the businesses in question and his unilateral control and disposition of the Fleetway, Inc., assets.

The uncontroverted record facts establish the following:

When the parties separated on September 6, 1979, the Gill's Tire Market business was defunct (R.420) and before the end of 1979 it was in bankruptcy (R.186-87, 420-21). The Fleetway Tire business was shut down the same week the parties separated (Exhibit P-7; R.278-79) and it never resumed operations. So, neither at the time the parties separated, nor at the time the divorce complaint was filed ten days later, nor at the time the restraining order was entered against Defendant on October 29, 1979, nor at the time the divorce decree was entered on January 22, 1980, was he operating either of the businesses or making a living therefrom.

After Fleetway was closed in September 1979, Defendant stored the idle assets and equipment of that business at various locations in Salt Lake County (R.205, 278-79, 296, 385-86) unknown to Mrs. Gill. They were not used again until October 1980, a year after the restraining order had been entered, at which time Defendant opened the Tire City business (R.205, 210, 365-69). His unilateral use and disposition of those assets was the subject of Mrs. Gill's discovery from the outset of the divorce action which discovery he evaded and disregarded notwithstanding her repeated applications and motions to the court for his compliance.

Contrary to the Court's recited understanding, the Gill's Tire Market and Fleetway, Inc., businesses were not ongoing and the parties were not dependent upon them for their livelihood during the period after their separation and up to the entry of the divorce decree. At the time the restraining order was entered it was not contemplated that Defendant would continue to operate them. Accordingly, it was not reasonable to conclude either that Mrs. Gill was aware of her ex-husband's business revenues or that she knew of his use of the Fleetway assets in his losing Tire City venture.

Lastly, the focal issue at trial was not Mrs. Gill's contention that her husband had "intentionally" secreted or disposed of marital assets. She assumed no such burden of proof. Rather, the difficult fact issues to which her evidence

was directed were the identification, location and valuation of the Fleetway, Inc., assets which had been under her husband's exclusive control at all times after their separation. If any statement was made during trial regarding Defendant's "intent" such reference was made only to emphasize what Mrs. Gill perceived to be the equities supporting her case and not by way of an acknowledgment that it was a fact required to be proved by her.

CONCLUSION

For the constitutional, statutory and equitable reasons set out above Appellant's appeal should be reheard.

COUNSEL'S CERTIFICATION

By his subscription to this Petition for Rehearing Appellant's counsel certifies that it is presented in good faith and not for delay.

RESPECTFULLY SUBMITTED this 13 day of May 1986.



GARY L. PAXTON
Attorney for Appellant

CERTIFICATE OF SERVICE

I hereby certify that four true and correct copies of the foregoing Appellant's Petition for Rehearing were served on Respondent this **13** day of May 1986 by depositing the same in the U.S. Mails, postage prepaid, addressed as follows:

Dwight L. King, Esq.
DWIGHT L. KING & ASSOCIATES, P.C.
2121 South State Street
Salt Lake City, Utah 84115



GARY L. PAXTON